

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.07.2016

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The Hon'ble Mr.Justice M.DURAIWAMY

CRP(NPD)NO.4332 of 2015
and M.P.No.1 of 2015

Ponnusamy

...Petitioner

Vs

1. Kulandaisamy Gounder
2. Kuppayammal
3. Kumarasamy
4. Selvi
5. Eswari

... Respondents

Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the fair and final order dated 09.09.2015 passed in E.A.No.25 of 2014 in E.P.No.12 of 2014 on the file of the District Munsif Court, Kangayam.

For Petitioner : Mr.N.S.Sivaprakash

For Respondents : Mr.N.Manoharan

O R D E R

Challenging the fair and final order dated 09.10.2015 passed in E.A.No.25 of 2014 in E.P.No.12 of 2014 on the file of the District Munsif Court, Kangayam, the 2nd plaintiff has filed the above Civil Revision Petition.

2. The plaintiffs have filed the suit in O.S.No.390 of 2007 for declaration and permanent injunction. The suit was decreed on 27.10.2010. Thereafter, the 2nd plaintiff filed an Execution Petition in E.P.No.12 of 2014 for punishing the defendants for disobedience of the decree passed in O.S.No.390 of 2007. In the said Execution Petition, the 2nd plaintiff took out an application in E.A.No.23 of 2014, seeking for appointment of an Advocate Commissioner to note down the physical features. The Executing Court allowed the application and the Commissioner had also visited the property and filed his report, noting down the physical features. Subsequently, the 2nd plaintiff took out another application in E.A.No.25 of 2014, seeking to appoint the very same Commissioner to measure the property and file his report. In the affidavit filed in support of the said application, the 2nd plaintiff has stated that the defendants have encroached into the suit property and hence the same can be ascertained only by the Advocate Commissioner. The application filed by the 2nd plaintiff was opposed by the defendants. The Executing Court, while dismissing the application, observed that if really, as contended by the 2nd plaintiff, the defendants have encroached the pathway, it would give rise to a separate cause of action and the same cannot be decided in this Execution Petition.

3. When the 2nd plaintiff has specifically contended that the defendants have encroached into the suit property and filed the Execution Petition for punishing them for disobeying the decree passed in the suit, the observation given by the Executing Court is erroneous. In case the defendants have encroached into the pathway, violating the decree for injunction, they are liable to be punished. The Executing Court cannot take a different stand that it is a different cause of action and the same cannot be decided in the Execution Petition. When the 2nd plaintiff has specifically stated that the defendants have encroached into the suit property, that can be ascertained by the Advocate Commissioner. Therefore, I am of the view that re-issuance of warrant of commission to the same Advocate Commissioner would be helpful for proper adjudication of the matter.

4. In these circumstances, the fair and final order dated 09.10.2015 passed in E.A.No.25 of 2014 in E.P.No.12 of 2014 on the file of the District Munsif Court, Kangayam, are liable to be set aside and the same are set aside. The District Munsif, Kangayam, is directed to re-issue warrant of commission to the Advocate Commissioner, who was appointed in E.A.No.23 of 2014 with a direction to measure the property and find out the alleged encroachment made by the defendants.

5. Since the Execution Petition is of the year 2014, I direct the District Munsif, Kangayam to dispose of the Execution Petition in E.P.No.12 of 2014 on merits and in accordance with law, with in a period of three months from the date of receipt of a copy of this order.

With these observations, the Civil Revision Petition is allowed. No costs. Connected miscellaneous petition is closed.

28.07.2016

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To
District Munsif Court, Kangayam.

M.DURAI SWAMY, J

CRP.(NPD)NO.4332 of 2015

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